No. 10014

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

JOHN LUHRING and MARGARET MORRIS, as joint tenants,

Plaintiffs and Appellants,

vs.

UNIVERSAL PICTURES COMPANY, INC., a corporation,

Defendant and Appellee.

APPELLANTS' REPLY BRIEF.

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Appellee, manifestly has been unable, and noticeably has failed to *answer* or *refute* appellants' authorities, contentions and arguments set forth in the opening brief, confessing thereby the weakness of its position herein and its inability to sustain the judgment. It is not *attempted* to answer Specification I, which discloses that the trial court *erred* in admitting testimony of appellee's witnesses to the effect that the declaratory decree, in their *opinion*, was erroneous.—a patent admission of error. Yet appellee blatantly has used this selfsame *inadmissible* evidence to support certain "findings" without which the judgment cannot be upheld. Appellee also has *ignored* the fact that the *record*—the declaratory relief action—*affirmatively discloses that the claim against Universal was assigned by*

Mayfilm to Joe May—the very fact which appellee's witnesses stated was *required* to *uphold* the Decree, and which, those *same* witnesses, in expression the *opinion* that the decree was erroneous, *expressly assumed was absent* therefrom. This, and similar examples, will receive further comment herein.

Reply to Appellee's Position and General Considerations.

The question involved herein cannot be reduced from appellants' twelve to the one stated by appellee. The sufficiency of the evidence is not the *only* issue herein, nor is German law *solely* involved. The *law of the forum*, and its *correct application*, must also be considered and determined upon this appeal. Neither does the evidence disclose any breaks in appellants' chain of title. That title is complete. It was the *erroneous* application of the law to the *evidentiary* effect of the Decree, and to facts disclosing an assignment from the bank to Mandl, which prompted the trial court to hold otherwise. Appellee's contention that the Kammergericht judgment adjudicated *between Mayfilm and Joe May* that May did not own the claim which resulted in that judgment, and that such determination was conclusive in *this* action, that Joe May never owned the judgment, is shown in both this and the opening brief to be without merit.

We neither deny nor dispute that *proof* of foreign law is a question of fact, but the *legal effect* of that law when proved, *is a question of law*. As correctly stated in *Cummings v. O'Brien*, 122 Cal. 204, 206 (54 Pac. 742):

> "It was competent to prove *as a fact* the law of that state (Texas) . . .. though the *effect* of that law when proved, was *a legal question for the court.*" (Italics ours.)

Therefore any "finding" which *gives only the legal effect of*, but *does not state what the foreign law is*, is only a *conclusion of law*. Therefore the finding relied upon to nullify the decree (portion of IV) that under German law the declaratory decree was *not binding* upon Universal, had no *effect* upon its rights to or ownership of the claim, and was not evidence herein, reciting the *effect* of, and *not what the German law is*, can only be a *conclusion* of law, without findings of fact to sustain it. In *Kinnard v. Kinnard*, 45 N. Y. 535, the *effect* of, but not the foreign law *itself* was pleaded. The Court stated:

> "That part of the plea . . . which alleges that defendant was *not bound* by the law, or in any manner subject to the jurisdiction of Massachusetts, *is a statement of law and not of fact* . . . It is a question of *law* whether he was *bound* by the laws of Massachusetts or subject to the jurisdiction of its courts." (Italics ours.)

The same vice permeates other vital "findings" herein (portions III and V, VI and VII) and destroys their efficacy as findings of fact.

Appellee has become enmeshed in the very web it seeks to weave for appellants. If the *recitals and facts* stated in the declaratory relief action are not evidence herein, then appellee's *opinion* testimony is *without foundation* and *becomes valueless*. If they are evidence (and the authorities so hold) then appellee is *conclusively bound thereby*, even though *not a party to that* action. Appellee *itself* does not claim title to, nor that some *third person* owns the German judgment. It asserts that *Mayfilm the unsuccessful litigant* in the declaratory action, *is still the owner* of the judgment, *notwithstanding* the *Decree* therein to the *contrary*. *Appellee therefore steps into the shoes of, and is in no more favored position than, Mayfilm,*

and like Mayfilm is conclusively bound by the decree. In *Perkins v. Benguet Cons. Min. Co.*, 55 Cal. App. (2d) 720 (132 Pac. (2d) 70)* plaintiff "offered *no evidence of her title . . .* except the *judgment roll* of the New York action" which *was admitted as competent and conclusive evidence of plaintiff's title* and the court *"ruled that the New York judgment and every finding upon which it rests was conclusive against defendant with respect to everything therein adjudicated, i. e., res judicata in the same way as if defendant had been a party to the New York action."* Additional authorities presently cited, also hold that "recitals" *are evidence.*

The outline of appellee's position (Br. p. 5) serves only to *illustrate* the *error* of its contentions. This is disclosed by the following:

I. Appellants established their ownership to the German judgment.

1. The declaratory Decree conclusively adjudicated that Joe May was the *owner* of the German judgment; that his assignment to the Bank was valid.

(a) The Kammergericht judgment did not adjudicate, *as between Joe May and Mayfilm*, that Mayfilm owned that judgment. But if it did, *the Decree being later in time, and directly between the claimants themselves, must prevail herein upon the issue of ownership* of the judgment.

2. The *Decree itself* was *effective* as, and constituted *a transfer of ownership* of the judgment from Mayfilm to Joe May, and from him to the bank. (The judgment roll therein further dis-

*Hearing denied by Cal. Supreme Court; certiorari denied by U. S. Supreme Court, 63 Sup. Ct. 1435; 87 L. Ed. Adv. Op. 1360; quoted extensively in Appellants' Opening Brief, pages 4-12.

closes that Mayfilm assigned the judgment claim to Joe May, who assigned it to the bank.)

3. There was an effective transfer of the judgment from the bank to Mandl.
   (a) By actual assignment. (Mandl's undisputed testimony.)
   (b) By the "notice" from the bank to Universal, constituting an equitable and therefore actual assignment under the law of the forum.
   (c) By operation of law.
4. The subsequent assignments (Mandl to Union Bank to appellants) being unquestioned, completes appellants' chain of title.

II. The declaratory Decree was effective to vest title in Joe May as against Universal. Under appellee's contentions said Decree is *conclusive* against it, *even though Universal was not a party to that suit.*

1. Appellee stands in the shoes of Mayfilm, when it asserts that Mayfilm, *notwithstanding the Decree*, still owns the judgment, and *like Mayfilm, is conclusively bound* by the Decree.
2. The Decree is *evidence* against appellee as a conclusive *"muniment of title"* under the laws of the *forum*, which *governs* on matters of evidence.

III. The recitals of the *Decree* are evidence herein, and appellee is conclusively bound thereby.

1. Since appellee (by virtue of its contentions) is concluded by the Decree, every recital and finding upon which it rests likewise binds appellee, even though not a party thereto.
2. If the recitals are not evidence, then appellee's *opinion* evidence (even if admissible) is without *foundation*, and therefore *valueless*.

ARGUMENT, POINTS AND AUTHORITIES.

I.

The Evidence Does Not Support Findings III and V.

Appellee relies upon (a) the Kammergericht "grounds for decision," and (b) opinion evidence to uphold the aforesaid "findings" (finding III in part only is attacked) to the effect that Mayfilm still owns the German judgment. Such evidence is legally insufficient. (Op. Br. pp. 14-19, 45-49.)

A. The Kammergericht "grounds" do not adjudicate that Mayfilm owns the German judgment. (Op. Br. pp. 45-57.) The *actual judgment* [R. p. 120; App. p. 1] makes no such adjudication. The "grounds" are but the *reasons* for the judgment, and the *Kammergericht "grounds" never became final.* The Reichsgericht, in affirming the *judgment*, gave its own "grounds for decision" [R. pp. 177-196] which *superseded and nullified* the Kammergericht's "grounds." The *Declaratory action* expressly recognized this factor [R. p. 221] and applied a rule similar to that in California, *i. e.*, that the *law* stated in the Appellate Court's decision *cannot be accepted as final* after the Supreme Court takes over the case. (*Snoffer v. City of L. A.*, 14 Cal. App. (2d) 650, 653 (58 Pac. (2d) 961); *McDonough v. Goodcell*, 13 Cal. (2d) 741, 745 (91 Pac. (2d) 1035).)

Further, the *question* presented to the *Kammergericht* was "The defendant lastly objects to plaintiff being the proper party . . ." [R. p. 127], and that Court's answer thereto was "The plaintiff is entitled to sue upon the claim." [R. p. 128.] The "grounds", regardless of the broad language used, *must be interpreted in light of the question presented—proper party (and not ownership)—*

and in accordance with the rule stated in *Harder v. Denton*, 9 Cal. App. (2d) 607, 609 (51 Pac. (2d) 199):

> "In determining the force and effect of a decision it is necessary to inquire into the questions which are presented for the court to determine. Frequently in an opinion by the court there is language which is simply the opinion of the writer thereof and does not decide the questions which are presented to the court and therefore does not become the law of the case which it decides."

The Kammergericht "grounds" also *stated* and *assumed* an *incorrect factual* situation. Distribution of assets *"among* associates," not a *sale* of assets for *cash* was therein considered; the *existence* of creditors and the *liquidation* of the corporation therein was *erroneously assumed*, and the statements therein were *dicta*. The foregoing matters and the *correct facts* were revealed, and successfully urged, in the Declaratory action. [R. pp. 220-224.] The following language in *Cox v. Tyrone Power Enterprises*, 49 Cal. App. (2d) 383, 397 (121 Pac. (2d) 829), is also most appropriate in construing the Kammergericht's "grounds."

> "But it is a rule of construction that 'a judicial opinion must be construed with reference to the facts on which it is based, the language used must be held as referring to the particular case, and read in the light of the circumstances under which it is used' (21 C. J. S. 409). Particularly is it true that incidental statements of conclusions not necessary to the decision are not to be regarded as authority."

It is also established that general language and expressions used in opinions are to be *considered, confined and limited* to the *particular facts* then before the Court,

and to the matters under consideration, and are not to be extended to cases where the facts are different. If they go beyond the case they do not control the judgment in a subsequent suit when the same point is again presented for decision. (*City of Pasadena v. Stimson*, 91 Cal. 238, 250 (27 Pac. 604); *Wood v. Roach*, 125 Cal. App. 631, 638 (14 Pac. (2d) 170); *Chapman v. State*, 104 Cal. 690, 697 (38 Pac. 457); *Ex parte Young Ah Gow*, 73 Cal. 438, 559 (15 Pac. 76).)

The Kammergericht "grounds" *as a matter of law* cannot constitute any adjudication herein upon the *issue of ownership* for the various reasons stated in the opening brief (pp. 49-57). As a matter of law and evidence, the subsequent Decree is conclusive herein upon the issue of ownership as between Mayfilm and Joe May.

B. Appellee's opinion testimony (Br. pp. 8-13) cannot support the findings. It is incompetent, legally insufficient, and without probative value. It was erroneously admitted over valid objection. (The primary objection—an attempt to impeach a final judgment [R. pp. 318-9, 334-5]—"inadvertently" is omitted from appellee's brief.) Appellee could not collaterally attack the Decree simply because Universal was not a party thereto [R. p. 320]. Mayfilm, admittedly could not do so, and no greater right accrued to appellee, who by asserting that Mayfilm still owned the judgment, despite the Decree, *stood in Mayfilm's shoes. Perkins v. Benguet, supra*, and other authorities cited in the opening brief are so conclusive of the foregoing that appellee has been unable to reply thereto. Dr. Golm's testimony (even if admissible) simply states that an assignment of the claim from Mayfilm to Joe May was required to vest title in May; that with such assignment the transfer of the claim was valid and complete; that without it nothing passed to May. *The*

record herein—Declaratory relief action—however affirmatively states that Mayfilm actually assigned the claim to May. The "Facts" [R. p. 228] therein *refer* to, the "grounds for decision" [R. pp. 228-9] therein *recited* and the witness therein *testified* [R. p. 236] "It is correct that there was assigned to . . . Joe May . . . the claim against Universal . . ." Dr. Golm stated that "An oral assignment could be sufficient [R. p. 456]; "that it wasn't necessary that it be written." [R. p. 457.] *The Decree therefore is correct under German law under appellee's own testimony.* Dr. Golm's *opinion* (erroneously admitted over objection [R. pp. 334-5]) that the Decree was *erroneous, has no probative force and is without value as evidence herein.* Both the *hypothetical question* asked, and the *answer* given, expressly *assumed the absence of facts existing in the record, i. e., that the claim was assigned by Mayfilm to Joe May.* That *opinion* (even if admissible) is therefore governed by the rule stated in *Barnett v. Atchison Railway Co.,* 99 Cal. App. 310, 317 (278 Pac. 443): *"The opinion of a witness upon assumed facts differing from those shown by the evidence cannot be given any probative force* (Estate of Purcell, 164 Cal. 300, 308 (128 Pac. 932), *and when such opinion is given in answer to a question which does not take the facts proved into consideration it is without value as evidence."* (Italics ours.)

To same effect *Estate of Purcell,* 164 Cal. 301, 308 (128 Pac. 932); *San Diego Land Co. v. Neale,* 88 Cal. 50, 63 (25 Pac. 977).

The trial court's impromptu and highly irregular reference to the declaratory action "as a sort of friendly suit" not only was outside of any issue urged below, but is totally devoid of even a semblance of evidentiary support in the record. Certainly a contested suit between a *liquidator* and a *bank* over the ownership of a *valuable asset*

bears no earmarks of a "friendly suit." The exact converse is true. Appellee's constant reference to that remark cannot raise it to the dignity of evidence, nor can it support the "findings" assailed (Portion of III and V) which in fact are but *conclusions of law.*

II.

The Evidence Does Not Support Finding IV.

Only the latter portion of "finding" IV, wherein the court "found" that under German law the Decree was not binding upon Universal; had no effect upon its rights to or ownership of the claim, and was not evidence herein, is assailed. (Op. Br. p. 21.) Appellee's own testimony (Br. pp. 16-19) *affirmatively shows* that *under German law*, the Decree although a *declaratory judgment*, and *not* a "judgment *in rem*," *nevertheless was binding, effective, res judicata, and created law between the litigant parties, i. e., Bank and Mayfilm, and that it established that the claim against Universal was owned by Joe May.* This, *as a matter of law*, destroys the questioned portion of the finding. The added statement that the Decree concluded only the parties and their privies, is immaterial, for the *effect* of the Decree as *evidence* against appellee, is governed not by German law, but *by the law of the forum.* (See Op. Br. p. 46.) This was recognized below. When inquiry was made as to the evidentiary value of the Decree in Germany, appellee's counsel objected "that German procedure was not applicable to this action. The court replied: ". . . by the doctrine of conflict of laws, *the effect to be given a judgment of a foreign court is determined by the law of the forum and not by the court which rendered the judgment. In other words, it is determined by the law of California, not by the law of the country where it was rendered.*" [R. p. 500.] (Italics ours.) Again the court stated (referring

to the effect of the Decree): ". . . but it seems to me it is a matter of evidence that can be determined by California law." [R. p. 481.]

Yet in making the finding *German procedure* and not *California law* was applied. Under California law, the Decree was evidence against the appellee as a "muniment of title." Where, as here, appellee asserted that Mayfilm, the unsuccessful party to the Decree, still owned the German judgment, appellee like Mayfilm, was concluded by the Decree, and by every finding and recital upon which it rested. (See Op. Br. pp. 46-48.) Further, under California law, the *recitals* of the Decree are evidence herein. *Perkins v. Benguet, supra; Page v. Garver,* 5 Cal. App. 383, 385 (90 Pac. 481), states: ". . . , we are nevertheless of the opinion that where a collateral attack is made, the *recitals* contained in the judgment *are sufficient evidence of the matters therein recited.* The judgment may be grossly unjust or erroneous, but the decision of the court as to all issues involved in the action stands as a finality between the parties and their privies until set aside in some mode recognized by law. (*Jones on Evidence,* Sec. 601.) In such case, where the judgment is one rendered by a court of general jurisdiction, *the recitals contained therein constitute evidence of their truth* and every intendment must be indulged in support of the judgment." (Italics ours.) *Simmons v. Threshour,* 118 Cal. 100, 101 (50 Pac. 312) states: "As the record offered . . . was competent evidence of the final adjudication . . ., so its recitals . . . were evidence of the facts recited; . . ." In *Estate of Hunsicker,* 65 Cal. App. 114 (223 Pac. 411) it was held that the contents of a document attached to the petition in an adoption matter and the *recitals* in the Pennsylvania decree supplied the necessary evidence of jurisdictional facts urged therein to be lacking.

Even *under German law*, the Decree *was evidence*. It was "evidence of title" [R. p. 501], "more than an assignment," "an assignment which had been confirmed by a court," and required independent facts showing title elsewhere to overcome it. [R. p. 531.] Such was appellant's testimony and appellee offered *no evidence* upon *that subject*. Appellee neither had, nor asserted any rights to or ownership of the judgment, so that portion of the "finding" also is unsupported. The assailed portion of "finding" IV cannot be sustained. It is also but a *conclusion of law*.

III.

The Evidence Does Not Support Finding VI.

Both the opening brief (pp. 49-51, 20-21, 14-15) and Point IA herein, disclose that Kammergericht "grounds" *as a matter of law* cannot sustain this finding for the following reasons: (a) *said "grounds" never became final but were superseded by the Reichsgericht "grounds"*; (b) "proper party"—not ownership—was the issue therein determined; (c) said "grounds" *assumed an incorrect factual* situation, *i. e.*, distribution of assets among associates—not a cash sale; the existence of creditors, and the liquidation of the corporation; (d) it *assumed* but did not actually *decide* that the claim had not been transferred; (e) the statements relied upon are "dicta"; (f) Mayfilm and Joe May were not *adverse* parties therein, therefore no adjudication of ownership *as between them;* (g) which is also true even if Joe May, as a purchaser became a party thereto; he still was not an *adverse* party to Mayfilm; (h) even if the "grounds" were an adjudication, the

later Decree, being inconsistent therewith, would prevail herein on the issue of ownership; and (i) this *subsequent* decree *transferred* the ownership to Joe May and nullified the "grounds" as *res judicata* on the issue of ownership herein; and (j) the interpretation of the "grounds" by the *German* court in the Decree should have been followed and adopted by the trial court; *besides it was the only German law on the subject.* The foregoing contentions are supported by unchallenged authorities (Op. Br. pp. 49-57) and remain unanswered. Nor do appellee's authorities sustain the finding. The rule that an assignee *pendente lite,* participating in the suit of an assignor, is bound by the result, has no application. The Kammergericht "grounds" for the reasons stated could not adjudicate the ownership of the claim *as between Mayfilm and Joe May.* But if it did, that ownership *at any time after that judgment* could be transferred from Mayfilm to Joe May, either by assignment, or involuntarily by decree of court, and such after-acquired title would defeat the prior adjudication. The subsequent Decree herein was effective as such transfer and *nullified* the prior adjudication, if any, on the issue of ownership. In the *Williams* case the plaintiff therein, against whom the judgment was offered, *claimed title in himself.* Appellee herein *claimed title in Mayfilm, the unsuccessful party to the decree.* This distinction is clearly defined in *Perkins v. Benguet, supra.* Besides *Scott v. Wardin,* 111 Cal. App. 587, 594 (296 Pac. 95) held that the *Williams* case did not conflict with nor was it contrary to the "muniment of title" rule. Finding VI is both unsupported and contrary to law.

IV.

The Evidence Does Not Support Finding VII.

The evidence of *actual* assignment (Bank to Mandl) was competent and sufficient. Appellee's objections thereto were without merit. From the questions asked (no objection as to form) and the answers given it is crystal clear that after Mandl paid upon his guarantee, the bank assigned the claim against Universal to him. (Appellee's witness admitted that the bank was obligated to assign the claim to Mandl [R. pp. 354-6] who was entitled to receive it. [R. p. 371].) Appellee made no attempt by cross-examination, or otherwise, to disprove *this* assignment, nor to inquire into the mechanics or formality by which it was made. Similar evidence, to which identical objections were overruled, has been upheld (*Bank of Italy v. Bettencourt*, 214 Cal. 571, 575-6 (7 Pac. (2d) 174)) and judgment has been reversed for failure to give effect to like evidence. (*Brown v. Patella*, 24 Cal. App. (2d) 362, 363 (75 Pac. (2d) 119).) Any error or uncertainty as to date of said assignment is immaterial. The *fact* of assignment, and *not* the *date* thereof, *governs*. (*Binford v. Boyd*, 178 Cal. 458, 464 (174 Pac. 56).) This evidence is particularly sufficient since appellee is *fully protected*, both *under German* and *American* law, from *further claim by or liability to the Bank*. The "notice" from the Bank [Pl. Ex. 11, R. pp. 295-7] under German law, Sec. 409 [R. p. 439; also Golm's testimony, R. pp. 349, 428] completely protects the appellee from "double" liability, and under American law, it constitutes an "equitable assignment which affords the same full protection. The appellee's rights are therefore governed by the following rule stated in *Bartlett Estate Co. v. Fraser*, 11 Cal. App. 373, 376 (105 Pac 130): ". . . *appellant is fully protected from further litigation or liability* in con-

nection with any claim of the bank on the paper, *and this should be the full measure of his right to enforce proof of assignment, or to question its validity.*" (Italics ours.) (See also Op. Br. pp. 67, 84.) It is also significant that prior to suit appellee denied liability *solely on other grounds.* [Pl. Ex. 13, R. pp. 520-22; Deft. Ex. B, R. p. 308.]

Neither was it necessary to produce the original assignment. No objection was interposed on that ground, nor was that the *basis* of the Court's decision. Besides, its whereabouts was unknown. [R. p. 264.] Wherever it was, it is clear from the testimony [R. p. 262] that it was *outside the jurisdiction* of the Court. Secondary evidence therefore was proper. (*Mackroth v. Sladky,* 27 Cal. App. 112, 119 (148 Pac. 978); *Zellerbach v. Allengberg,* 99 Cal. 57, 73 (33 Pac. 786); *Gordon v. Searing,* 8 Cal. 49; *Burton v. Driggs,* 20 Wall. 125, 134, 22 L. Ed. 299, 302; 20 *Am. Jur.* 386, par. 434.)

Appellee relies solely upon the trial court's *opinion* to sustain its contention. Obviously no other supporting authority can be found. Point VII of the Opening Brief (pp. 74-84) has demonstrated said opinion to be so clearly *erroneous* that further discussion would be but repetition. Clearly Mandl's rights could not be restricted solely to an "assignment by operation of law" under the *issues tried* and the *evidence presented* in this case. The trial court was duty bound to determine *upon the merits all issues presented,* including the one of *actual assignment.* (Op. Br. pp. 78-9.)

Appellee also *incorrectly* has stated the record herein. There is *testimony* herein (independent of the recitals) that Mandl paid the debt to the *Bank* [R. pp. 262-3, 270, 281, 290-1]; that there was a loan to Mayfilm [R. pp. 273-4, 279-80, 288]; that Joe May assigned the judg-

ment to the Bank [R. pp. 482, 280-1, 289]; and that Fritz Mandl received an assignment. [R. pp. 263-4, 270.] Further, despite appellee's unsupported claim, the *recitals* of the *Declaratory suit are evidence* in this case, and must be so considered. (*Perkins v. Benguet, supra; Page v. Garzer, supra; Simmons v. Threshour, supra; Estate of Hunsicker, supra.*)

Appellee relies upon (a) opinion evidence and (b) a claim that no Divisenstelle permit was obtained to sustain its contention that there was no assignment by operation of law. Neither position is sound. Appellee attempted to offset the *written German law* (Sec. 774, where a guarantor satisfies the creditor the latter's claim is transferred to the former [R. p. 250], and Section 401, that with the claim so transferred any security given and the rights appertaining thereto are likewise transferred [R. p. 251]) with opinion testimony to the effect that an actual assignment was required to vest title in Mandl. (There was an actual assignment.) The entire evidence on that subject, and the fallacy of appellee's contention, is fully treated in the Opening Brief (pp. 25-32, 57-61) and need not be repeated. The testimony quoted by appellee (Br. pp. 27-29), as well as that *immediately following* [R. pp. 355-6] discloses that: ". . . the Bank was under obligation to assign this claim, after the Bank was satisfied, to Mandl who paid . . ." and, that the witness' *opinion* to the effect that an actual assignment was required, was based upon an *inapplicable* case, which itself does not support the witness' construction thereof. (See Op. Br. pp. 27-30.) The evidence herein further revealed that in banking transactions, by virtue of "commercial usages and custom"—those very usages and customs which appellee's case, *The Asiatic Prince, stated must be considered in construing foreign* law—an actual assignment was not required, but that the claim and the

security passed from the Bank *by operation of law to the party entitled thereto.* [R. pp. 443, 493-4, 532-3.] This was never denied. Therefore appellee's opinions, based upon an inapplicable case, and giving no consideration to "commercial usages and custom" is *without value as evidence.* (*Barnett v. Atchison Ry., supra; Estate of Purcell, supra; San Diego Land Co. v. Neale, supra.*)

The record herein further discloses that the Divisenstelle permit *was obtained.* Dr. Lenk so testified in his deposition as follows: "Q. Did you, on behalf of your bank, obtain a promise from the Foreign Exchange Control Office in Berlin for the transfer and assignment of the judgment obtained by May Film A. G. against Universal Pictures? . . . A. I did." [Rep. p. 383.]

Upon cross-examination further inquiry was made, and explanation given concerning the permit, and the details thereof. [R. pp. 284-5.] The testimony also disclosed that the original was in the archives of the Bank in Germany, and *outside the jurisdiction* of the court. [R. p. 284.] The evidence therefore was proper and sufficient. (*Mackroth v. Sladky, supra; Zellerbach v. Allengberg, supra; Gordon v. Searing, supra; Burton v. Driggs, supra;* 20 *Am. Jur.* 386.)

Further, appellee's counsel stated that he had, but refused to stipulate that it was, a copy of the permit, together with its translation. It therefore could not be used. [R. pp. 286, 539-40.] Under such circumstances Sec. 1963, subd. 5, of the Cal. C. C. P. is most applicable.

Besides, both Dr. Golm [R. p. 364] and Dr. Gebhardt [R. pp. 540-1] testified that if permission was obtained to apply a French franc account to the payment of a debt, that no *further* permission was necessary to assign or transfer the judgment to a national of another country. The one permit was sufficient.

The evidence discloses that Mandl's French franc account at the Bank was used in payment of his guarantee [R. pp. 262, 281]; that the bank belonged to the Divisen Bank and was under strict governmental control. [R. p. 501.] Therefore, even if the record fails to disclose (which it does not) that the Divisenstelle permit had been obtained, appellee does not benefit thereby, for then the following presumptions of Sec. 1963, Cal. C. C. P., *would apply, and supply the necessary evidence, i. e.*, "that the law has been obeyed" (subd. 33); "that official duty has been regularly performed" (subd. 15); "that private transactions have been fair and regular" (subd. 19); "that the ordinary course of business has been followed" (subd. 20); "that a person is innocent of crime or wrong" (subd. 1). In *H. D. Haley & Co. v. McVay*, 70 Cal. App. 438, 440 (233 Pac. 409), it was urged that because there was no proof that plaintiff, a foreign corporation, had qualified to do business in California, that the contract sued upon was void. The Court held that the presumption, "that the law has been obeyed," supplied the necessary evidence, and the validity of the contract was upheld. Also, to the same effect: *In re Sterling*, 96 F. (2d) 616; *N. L. R. B. v. Sterling*, 109 F. (2d) 194, 205; *Miller v. Soloman*, 100 Cal. App. 756, 762 (279 Pac. 660); *Borges v. Pac. Greyhound*, 10 Cal. App. (2d) 450, 453 (51 Pac. (2d) 1146); *Brill v. Brill*, 38 Cal. App. (2d) 741 (102 Pac. (2d) 534).

It is also well established that the questions of presumptions are governed by the *law of the forum*. (*Sayles v. Peters*, 11 Cal. App. (2d) 401, 407 (54 Pac. (2d) 94); 78 A. L. R. 884; *Restatement—Conflict of Laws*, 710, par. 595; 11 *Am. Jur.* 522.) The foregoing presumptions are therefor all applicable herein. For the foregoing reasons it follows that appellee's "Divisenstelle argument" is without merit.

Appellee's contentions as to "equitable assignment" likewise are untenable. The amended complaint sufficiently tendered that issue. Paragraph V [R. p. 7] states: ". . . That notice of payments . . . *together with the assignment* (the "notice" involved) . . was given defendant . . ." In California it is not necessary to allege the facts concerning an equitable assignment in order to raise that issue. (*Puterbaugh v. McCray,* 25 Cal. App. 469, 472 (144 Pac. 149); 3 *Cal. Jur.* 302.) Besides, the issue of equitable assignment was actually tried during the course of the trial, so whether that issue was within the pleadings was immaterial. (Rule 15b, Fed. Rules. Civ. Proc.) The Court should have determined that issue *upon the merits.* (Op. Br. pp. 77-78.)

Appellee's contention that German law governs the interpretation of the "notice" as an assignment is both legally and factually incorrect. Contrary to appellee's statement (Br. p. 31) this assignment was made by a *German* assignor to an *Austrian* citizen (before the Anschluss) [R. pp. 272, 296, 361], as assignee, and transferred a German judgment *out of Germany* with the permission of the Divisenstelle to make such transfer, to a national of another country, residing outside of Germany. It involved the obligation of an *American debtor,* residing in New York, the place where the "notice" was delivered and received; where payment on behalf of the Austrian was demanded, and where payment was to be made. The "notice" expressly directed the *American debtor* to pay the *Austrian* assignee, and *not* to pay the *German* assignor. Under such circumstances, how can it be said that the judgment was to be paid in Germany, and that German law governed Mandl's right to receive the money. If so, why all the argument about the necessary for the Divisenstelle permit? Its very purpose was to *permit payment to be made outside of Germany to a person, not*

a German national. It becomes obvious that the effect of the "notice" as an assignment must be governed by American law. This is particularly true when we consider that it is the established rule that a debt, for the purpose of collection, is always ambulatory, and accompanies the person of the debtor. (11 *Am. Jur.* 381.) Either California or New York law applies in determining the legal effect of the "notice" as an assignment. In both places it is the law that said "notice" was an equitable assignment and constituted Mandl the legal owner of the judgment. These rules and the applicable authorities are fully set forth in the Opening Brief (pp. 63-67, 82-84).

There is no merit to the claim that appellants' motion for new trial was properly denied, because Dr. Lenk in his affidavit stated from memory the contents of the written assignment from the Bank to Mandl, without a showing that the original itself had been lost, destroyed or unavailable. The copy of which Dr. Lenk spoke was in Germany, *outside the jurisdiction* of the Court, and unavailable. The original had been sent to Mandl in Vienna, who had testified that he did not know where it was, but probably in Vienna among his papers. Mr. Hirschfeld's affidavit showed that Mandl was forced to leave Austria. [R. p. 63.] Since both the original and copy of said assignment were outside the jurisdiction of the Court, the assignment was within the rule of "lost documents," and secondary evidence of its contents was admissible without further foundation. (*Mackroth v. Sladky, supra; Zellerbach v. Allengberg, supra; Gordon v. Searing, supra; Burton v. Driggs;* 20 *Am. Jur.* 386.)

Appellee's further contention that due diligence was not used is without merit. Mr. Hirschfeld's affidavit further discloses the various difficulties encountered in this suit; that the depositions of Mandl and Dr. Lenk actually were not received until the date of trial and that their contents were unknown until trial; that Mandl's whereabouts were on most occasions unknown and that Dr. Lenk's presence in America was only discovered shortly before trial. The denial of the motion was erroneous, and Finding VII is unsupported by and contrary to the evidence.

V.

The Material "Findings" Are Conclusions of Law.

Appellants' contention cannot be summarily dismissed as appellee seeks to do. The "findings" herein assailed—portions of III (Op. Br. p. 14), and IV (Op. Br. p. 21) and all of V [R. p. 37], and VII [R. p. 38]—are clearly conclusions of law. They cannot be upheld as "ultimate facts." These "findings" purport to give the *legal effect* of the German law, *but do not state what that German* law is. Such findings of foreign law are clearly insufficient. Cases dealing with the insufficiency of pleadings which give the legal effect of, but do not state what the foreign law is, have been before the courts repeatedly. The courts have consistently held that such pleadings are only *conclusions of law* and *not statements of fact.* These authorities are especially pertinent herein, because the sufficiency of a finding and the sufficiency of a pleading *are governed by the same rules.* (*Carpenter v. Froloff,* 30 Cal. App. (2d) 400, 407 (86 Pac. (2d) 691) states:

"The sufficiency of the findings of fact to support a judgment is tested by the same rules that are applied to test sufficiency of a pleading to state a cause of action." Also, *Clarke v. Standard Acc. Ins. Co.*, 43 Cal. App. (2d) 563, 570 (111 Pac. (2d) 353); *County of San Louis Obispo v. Gage*, 139 Cal. 398, 409 (73 Pac. 174); 24 *Cal. Jur.* 969.

It is not sufficient in a pleading to merely state the effect of the laws of a foreign country, but such laws must be pleaded as facts are pleaded, and must state what the laws are, and not what the effect of such laws may be, or what the rights of the parties are under them.

In *Grand Lodge etc. v. Clark,* 189 Ind. 373 (127 N. E. 280) [see App. p. 2], the effect, but not the Ohio law itself was pleaded. In holding such pleading insufficient, the Court said: *"He does not state what the laws are, but he states what . . . is the effect of those laws. It is not sufficient in a pleading to state the effect of the laws of a sister state but such laws must be pleaded as facts are pleaded, and must state what the laws are and not what the effect of them may be."* (Italics ours.)

In *McDougald v. Rutherford*, 30 Ala. 253, 257 [see App. p. 2], it was alleged that by the laws of Georgia, McDougald became liable to pay the money set forth in the note. Demurrer was overruled. Reversing the judgment, the Court stated: *"The declaration does not state what the law of Georgia is or was, but states a conclusion as to the effect of that law and as to the rights and liabilities of the parties under the law."*

In *Rothschild v. Rio Grande W. Ry. Co.*, 59 Hun. 454 (13 N. Y. Supp. 361) [see App. p. 3], the Court states:

"The demurrer is upon the grounds that the laws of Colorado and Utah are facts which must be pleaded and that the bare allegations that under these laws the liabilities of consolidated companies became attached to defendant and enforcible against it, is insufficient to constitute a cause of action. We think the demurrer was well founded. The allegation is not a statement of fact, but of a legal conclusion from undisclosed facts. . . . The law of a foreign state is a fact to be alleged and proved like any other facts." (Italics ours.)

In *Kinnier v. Kinnier*, 45 N. Y. 535 [see App. p. 4], it was alleged that according to the laws of Illinois and the practice of the Court, and in consequence thereof, the Court could not entertain jurisdiction of the case. Also, that the judgment was void in Illinois. The Court stated: *"These are statements of law, not of fact, and the sufficiency of the pleading is to be determined by facts stated not by conclusions of law averred.* In Starback v. Murrey (5 Wend. 159) Marcy, J., said: *'That part of the plea in this case which alleges that the defendant was not bound by the laws, or in any manner subject to the jurisdiction of Massachusetts is a statement of law and not of fact. . . . It is a question of law whether he was bound* by the laws of Massachusetts or subject to the jurisdiction of its courts.'" (Italics ours.)

If in the foregoing cases the word "findings" were substituted for "pleadings," we would have the exact case at bar. The following cases [see excerpts therefrom in the Appendix, pp. 4-10] are to the same effect: *Wilson v. Clark*, 11 Ind. 385; *Lomb v. Pioneer Sav. & L. Co.*, 96

Ala. 430, 434 (11 So. 154); *Temple v. Brittan*, 11 Ky. L. Rep. 467 (12 S. W. 306); *Gibson v. Chicago Ry. Co.*, 225 Mo. 473 (125 S. W. 453); *Bank of Commerce v. Fuqua*, 11 Mont. 285 (28 Pac. 291); *Jenness v. Simpson*, 81 Vt. 109 (69 Atl. 646); *Lowry v. Moore*, 16 Wash. 476, 479 (48 Pac. 238); *Swing v. Kargas Furn. Co.*, 150 Mo. App. 574 (131 S. W. 153); *Templeton v. Sharp*, 10 Ky. L. Rep. 499 (9 S. W. 507); *Stockham v. Simmons*, 67 Ill. App. 83; *Pearce v. Rhaven*, 13 Ill. App. 637, 640; *Cubbedge H. & Co. v. Napier*, 62 Ala. 518.

Applying the rule of the foregoing cases to the "findings" in question, it becomes crystal clear that they cannot be sustained as findings.

That portion of Finding III, which states that under German law the judgment was and it at all times remained the property of Mayfilm and could only be enforced by it; and that portion of Finding IV, which states that under German law the Decree did not bind appellee, had no effect upon the rights to or the ownership of the judgment, that it was not evidence herein; and Finding V, which states that under the German law Joe May never acquired ownership of the judgment and that the facts relied upon were insufficient to have the effect of transferring the judgment to him; and Finding VII, which states that under German law none of the transactions had between May, the Bank, and Mandl had the effect of transferring the judgment to Mandl, and that the facts relied upon were insufficient to vest title in Mandl are, and each of them is, *naked conclusions of law*. As findings, they cannot be sustained; as conclusions, they are

not supported by the remaining findings nor by the law, and the judgment based thereon cannot be upheld. Besides, Findings V and VII are so vague, uncertain and indefinite, and draw general conclusions from unknown and undefined facts, that they come within the condemnation of the rule stated in *Polheim v. Carpenter*, 42 Cal. 375, 386-7 (quoted in Op. Br. p. 70).

Appellee admits (Br. p. 37) that the statement in Finding IV that the Decree "was not evidence against defendants" *is a question of law*, but it says it *is a question of German law*, and therefore a proper finding. Such argument is untenable. The Decree, as evidence, is determined by the *law of the forum*, not German law; and while *proof* of foreign law is a *question of fact*, the *effect* of that law, when proved, *is a question of law*. (*Cummings v. O'Brien, supra; Jenness v. Simpson, supra.*) The findings are fatally defective.

VI.

Reply to Appellee's "Resume of Principles."

a. It is true that plaintiff must prove the fact of his assignment. This may be done by a judgment which determines title to property, *even against a non-party debtor*, where such judgment is an introductory fact to, the foundation of, or a "muniment" of plaintiff's title. (*Chapman v. Moore*, 151 Cal. 509, 516 (91 Pac. 324); and authorities cited in Op. Br. pp. 46-7.)

If the debtor asserts that title is still in the *unsuccessful* party to such judgment, the debtor, like the unsuccessful party, is conclusively bound by said judgment. (*Perkins v. Benguet, supra;* also Op. Br. p. 48.)

Where the debtor is protected from further litigation or liability, that is the full measure of his right to enforce proof of assignment, or question its validity. (*Bartlett Estate Co. v. Fraser, supra; Dorner v. Heffner*, 15 Cal. App. (2d) 97, 101 (58 Pac. (2d) 1308; see also Op. Br. pp. 67, 84.)

b. Appellee's statement is incomplete. The true rule is that a final judgment of a foreign country having jurisdiction to pronounce the judgment shall have the same effect as in the country where rendered, *and also the same effect as a final judgment rendered in California.* (Sec. 1915, C. C. P.; *Blain v. Burge*, 75 Cal. App. 418, 420.) Thus the law of Germany governed as to the effect of the Decree upon the rights, interests and conclusive adjudication between the parties and privies thereto. The law of California governed as to the *evidentiary effect* of said Decree. (*Sayles v. Peters, supra;* also Op. Br. p. 46.) In California it is conclusive *evidence* against the appellee. (*Perkins v. Benguet, supra.*)

c. Where an assignment is made in one place to be performed in another, the law of the place of performance will control in determining the validity of the assignment or whether an assignment exists. (See citations Op. Br. p. 83.)

The effect of an assignment is to be determined by the law of the forum, or the place where the rights claimed under the assignment are sought to be asserted. (6 *C. J. S.* 1138; *Block Bros. v. Liverpool & London etc. Co.*, 208 Ala. 523, 94 So. 563; *Jos. Dixon Crucible Co. v. Paul*, 167 Fed. 784, 786.

d. We admit that testimony regarding custom and usage is permissible in aid of interpretation of foreign law. That is all appellee's cases hold. Appellant' objections went to the *opinions* of appellee's witnesses (not upon custom or usage) which did *not interpret*, but *directly contradicted* the *written law*. This even appellee authorities do not *permit*.

e. Appellee practically *concedes* that the trial court erred in failing to give effect to the Decree. It seeks to support the Court's ruling by the Court's *own* opinion. No other authority is cited. This for obvious reasons. A comparison of the opinion with the cases of *Perkins v. Benguet, supra; Chapman v. Moore, supra;* and the authorities cited in the Opening Brief (pp. 46, 47, 48) quickly and conclusively demonstrate that said opinion is *clearly erroneous*.

VII.

Reply to Appellee's Criticism of Appellants' Brief.

Much ado is made by appellee that dots, used to indicate an omission, inadvertently are not included in *one* of appellants' many quotations. Originally, the quotation included them, but in the various drafts of the brief, the dots, some how became deleted, and their absence remained undetected. Most certainly it was not appellants' intention to mislead either court or counsel. We sincerely believe that we have not done so.

Appellee's criticisms of certain of appellants' authorities (Op. Br. p. 64) are without merit. In the *Dixon* case the precise point urged by defendant therein (being the

same as urged by appellee herein in respect to Mandl) was that plaintiff was not the owner of the chose in action upon which suit was brought, and that the assignment, under which he claimed, did not vest the title thereto, in plaintiff. The court held that whether the assignment vested title in plaintiff, as to authorize the suit and entitle him to judgment must be determined *by the law of the forum*. In the *Pritchard v. Norton* case, despite appellee's statement, the law *ultimately* applied therein, was the law of the place of *performance*, and not that of the place where the assignment was *made*.

Appellee, in its brief, like in the trial below, simply built up "straw men" so that it could knock them down. In reality, despite the apparent confusion, which appellee created below, and seeks to maintain in its brief, appellee's contentions and position, are unsound, and when analyzed in the *light* of the applicable authorities, clearly are untenable.

Conclusion.

In conclusion, we respectfully maintain that appellants have clearly established their chain of title to the judgment sued upon, and are entitled to recover thereon. We further respectfully contend that appellee utterly has failed to answer or refute, by satisfactory argument, or by applicable authority, the errors claimed, and the authorities cited by appellants. We therefore respectfully submit that upon the grounds and for the reasons stated, both herein and in the Opening Brief, that the judgment herein be reversed, with costs to appellants.

Respectfully submitted,

Ellis I. Hirschfeld,

Samuel W. Blum,

Attorneys for Appellants.

APPENDIX.

Portion of Kammergericht Judgment [R. p. 120].

The 25th Civil Senate of the District Court of Appeal in Berlin, has, upon oral hearing of July 8, 1932, in the presence of the President of the Senate, Huecking, and the Counsellors of the District of Appeal, Kliene and Voss, have ordered adjudged and decreed: Upon appeals of both parties the judgment rendered on March 4, 1930, in the 17th Chamber of Commercial matters of the Superior Court I, Berlin, is changed as follows:

(1) The Defendant is ordered upon the complaint to pay 50,000.-R.M., plus 2% interest over and above Reichsbank discount rate from July 1, 1926.

Prayer of the Complaint for additional interest is denied.

(2) Upon the Cross-Complaint it is adjudged that the Plaintiff is not entitled to damages in excess of the 50,000 R.M., with interest awarded under 1) under the agreement of May 10, 1926.

(3) The costs of the lawsuit are canceled against each other.

(4) Temporary execution may issue under this judgment, the Defendant being permitted to prevent execution of judgment by putting up a bond in the amount of 55,-000.00 R. M.

Grand Lodge, etc. v. Clark, 189 Ind. 373, 127 N. E. 280:

"It will be observed in this case that the appellant does not state whether or not the laws of Ohio upon which he relies were statutory. *He does not state what the laws are, but he states what in his opinion, is the effect of those laws. It is not sufficient in a pleading to state the effect of the laws of a sister state but such laws must be pleaded as facts are pleaded, and must state what the laws are and not what the effect of them may be.*" (Italics ours.)

McDougald v. Rutherford, 30 Ala. 253, at 257:

"The declaration after setting out the execution of the note, and its endorsement by the defendants' intestate at Columbus, Georgia, averred that 'by the laws of the State of Georgia where said endorsement was made, the said Daniel McDougald became liable to pay said sum of money in said note specified, to said plaintiff; and being so liable,' etc. A demurrer to the declaration was interposed, but overruled by the court.

". . . If then the declaration be good it must be made so by the pleading of the Georgia law. It is indispensable to the maintenance of the declaration that the averment of the Georgia law should show that the facts set forth impose a legal liability upon the defendant according to that law. *The declaration does not state what the law of Georgia is or was, but states a conclusion as to the effect of that law and as to the rights and liabilities of the parties under that law.* . . . The demurrer to the declaration ought to have been sustained and the court erred in overruling it." (Italics ours.)

Rochschild v. Rio Grande Western Railway Co., 13 N. Y. S. 361, 59 Hun. 594:

"The only allegation in the complaint from which this legal liability can be inferred is in these words: 'Thereby, and under the laws of the State of Colorado and of the Territory of Utah aforesaid, all the debts, liabilities, and duties of said consolidating companies and corporations, respectively, thereupon attached to said new corporation, the defendant herein, and became enforcible against it to the same extent as if said debts, liabilities, and duties had been incurred or contracted by it.' *The demurrer is upon the grounds that the laws of Colorado and Utah are facts which must be pleaded and that the bare allegations that under these laws the liabilities of consolidated companies became attached to defendant and enforcible against it, is insufficient to constitute a cause of action. We think the demurrer was well founded. The allegation is not a statement of fact, but of a legal conclusion from undisclosed facts.* It is in effect saying that under foreign laws of which we know nothing one person has become liable for another's personal debts and it differs in no substantial particular from an allegation,—which has always been treated as a mere conclusion—that the defendant is indebted to the plaintiff. It is clear that the foreign law should have been pleaded. *The law of a foreign state is a fact to be alleged and proved like any other fact.* It is not necessary to plead the evidence of the fact, whether such evidence be embodied in the statutes of a foreign state or in the decision of its courts. *But the fact that a given proposition is the law must be stated, if such fact is essential to a recovery.* Judgment reversed." (Italics ours.)

Kinnier v. Kinnier, 45 N. Y. 535:

"It is true that the complaint states that an answer not replied to is taken as true according to the laws of the State of Illinois and the practice of the court and 'in consequence thereof, the said court could not entertain jurisdiction of said case.' It is also alleged in general terms that the judgment was void in the State of Illinois. *These are statements of law, not of fact, and the sufficiency of the pleading is to be determined by facts stated not by conclusions of law averred.* In Starbuck v. Murrey (5 Wend. 159) Marcy, J. said: *'That part of the plea in this case which alleges that the defendant was not bound by the laws, or in any manner subject to the jurisdiction of Massachusetts is a statement of law, and not of fact . . .* It is a *question of law whether he was bound* by the laws of Massachusetts or subject to the jurisdiction of its courts.'" (Italics ours.)

Wilson v. Clark, 11 Ind. 385:

". . . and the complaint contained the following clause: 'By the law of Michigan in force at the date of the note and from thence hitherto the said Clark, or his endorsee, can alone maintain the action . . .'"

"The clause quoted from the complaint amounts to *nothing. It is a mere assumption by the pleader of a legal proposition without the averment of any facts for the proposition to rest upon. Pleadings should state facts, not legal propositions.*" (Italics ours.)

Stockman v. Simmons, 67 Ill. App. 83:

"The plaintiff in error pleaded that the note was executed and delivered in Indiana; that the plaintiff in error was only surety for Adell as the defendant in error knew at the time and that by the laws of the State of Indiana and by force of the statutes of Indiana in such cases made and provided; . . . the property of a surety upon a note or contract cannot be held liable for the debt until after the property of his principal shall have been exhausted by legal process . . . the plea does not state facts but inferences." 1 Ch. Pl. 196 Ed. 1828: "What can or cannot be done by statutes of another state is a conclusion from the terms of the statute, and to claim any rights under such statute it must be set out . . . A demurrer was rightfully sustained to the plea."

Pearce v. Rhawn, 13 Ill. App. 637, at 640:

"The first allusions to the laws of Pennsylvania is the mere conclusion of the pleader that the appointment of the appellee as trustee was in accordance with the statutes of that State, but the statutes themselves are not set out, nor is anything shown from which it can be determined whether that conclusion is in accordance with the facts or otherwise. The second allusion to the Pennsylvania law is also a mere conclusion of the pleader that, according to the laws of that State, that is by force and operation of those laws, the estate of John Landenberger became vested in said trustees. What those laws themselves are, is not shown, nor is anything averred from which we are able to determine whether they have, or can have the force and operation thus attributed to them. It follows that the demurrer to the interpleader should have been sustained and for error in overruling it the judgment will be reversed and the case remanded."

Lomb v. Pioneer Sav. & L. Co., 96 Ala. 430, 434 (11 So. 154):

"Its language is, Complainant avers that, according to the laws of Minnesota, in force at the time of said contract and note, it was provided that any premium taken for loans made by the association such as complainant was, should not be considered or treated as interest, nor render such association amenable to the laws relating to usury. This, as a pleading of a foreign statute, is wholly insufficient under the authorities we have cited. It is insufficient for another reason. *It simply avers the effect of the law* on 'premiums taken,' and *contains no statement what the provisions of the law of Minnesota are* as to premiums or interest promised to be paid." (Italics ours.)

Cubbedge, H. & Co. v. Napier, 62 Ala. 518:

"A general averment of the existence of the statute, and that it confers the right is not sufficient. It is a statement of the pleader rather than a statement of facts."

"If the usury consists in the violation of the law of a state other than that in which the enforcement of the contract is sought, the law is matter of fact, which must be pleaded with the certainty that any extrinsic fact must be pleaded which is essential to a right of action, or to constitute a defense. The pleader may be well satisfied of his construction of the foreign law, and may assert it as the law itself; that is not his province. The law must be substantially stated; and the facts must be averred which are supposed to constitute its violation. Then, the court can determine whether the facts—the foreign law, which is but a fact—and the transaction supposed to offend it, compel a repudiation of the contract."

Gibson v. Chicago G. W. Ry. Co., 225 Mo. 473, 125 S. W. 453:

"Plaintiff states that under and by virtue of Sections 3313 and 3443 of the Code of Iowa, actions for damages for the death of Martin M. Welch, survived to plaintiff, as administrator, and under and by virtue of said sections, plaintiff is authorized and empowered to sue and recover damages caused by the death of Martin M. Welch against defendant on account of the carelessness and negligence of defendant which resulted in the death of Martin M. Welch as hereinafter alleged:

"*The allegations are in no sense statements of fact but are clearly conclusions of law drawn by the pleader.* It is elementary that where a foreign statute or the statute of another state, is relied upon as giving, conferring or constituting a question of action, it must be substantially stated with such distinctness that the court may judge its effect. Not only must the law in such case be pleaded but the fact which constitutes its violation must also be pleaded."

Phinney v. Phinney, 17 How. Pr. Rep. 197 (199):

"He died in April 1852, where not stated, leaving a widow and two sons and two daughters, who by his death it is said, under the laws of Spain and the provisions of the will of the deceased, without saying there were any such laws or will, or what were their contents became 'seized and possessed' of the whole estate, real and personal, and entitled to and interest in the same . . . *This kind of statement involves a mere conclusion or inference in which the plaintiffs, it will be readily seen, may be greatly mistaken. They in effect express an opinion of the law* and ask the court blindly to adopt it, without giving to the court the necessary materials to

test its correctness. Foreign law as well as private wills are mere facts, and like other facts must be set forth and proved. It is for the court and not for the parties to determine their legal effect when produced." (Italics ours.)

Temple v. Brittan, 11 Ky. L. Rep. 467, 12 S. W. 300:

"The allegation . . . is in substance that the infant intestate being domiciled in the State of Tennessee at the time of her death, her estate passed to her heirs at law under the statutes of descent and distribution of that state, and the appellants are the sole heirs at law of said intestate and as such they assert title."

"*Such an allegation is not*, as has been frequently decided by this court, *equivalent to a statement of fact, but admits to no more than a mere conclusion or interpretation of law* . . . the conclusion of which the court has no means of determining in the absence of the statutes."

Templeton v. Sharp, 10 Ky. L. Rep. 499, 9 S. W. 507:

". . . and that the legal rate of interest at that time in said state according to laws of said state was 10% per annum on all such obligations and that the contract to pay interest . . . as stipulated in said note was lawful in said state and enforcible under the laws thereof.

"This, so far as the law of California is concerned is *but a statement of a legal conclusion* . . . There is no reference to the particular statute of that state, if there be one upon the subject. There is no statement of it to enable this court to form an opinion as to its legal

effect. *To hold the plea good the opinion or conclusion of the pleader must be accepted as a fact.*"

"If the law of another state is relied upon by a party in the court of this state, *it must be regarded as a fact*, which like any other *fact must be so pleaded that the court may judge of its legal effect.*" (Italics ours.)

Jenness v. Simpson, 81 Vt. 109, 69 A. 646:

"And the defendant avers 'that on September 24, 1906, and for a long time previous thereto, ever since and now, it was and is the law of the State of South Dakota that a husband and his wife may legally contract with each other in the manner set forth in the contract . . .'"

"*When the law of a sister state is properly set forth in the pleading as a fact, then a question of law arises therefrom as to the legal effect.* Here without setting forth the law the pleader makes an averment of his conclusions of *the legal effect, which is a conclusion of law* (citing authorities). It is a rule of pleading established beyond question that so much of the law of another state, or foreign country, as is material to the case, must be set forth by the party complaining or defending under it, that the court may judge of its legal effect." (Italics ours.)

Lowry v. Moore, 16 Wash. 476 (479), 48 Pac. 238:

". . . the settled law is where a party relies upon the statutes of a sister state *he must plead it as he would any other fact, not by stating what in the opinion of the pleader is its legal effect but the statute itself should be set forth.*" (Italics ours.)

Bank of Commerce v. Fukua, 11 Mont. 285, 28 Pac. 291:

"The averment that the trusts are by the laws of the state in which the lands are situated, valid and subsisting trusts is therefore nothing more than an averment of the conclusion of the pleader, based (1) upon his knowledge of the existence of said statutes and (2) upon his construction of the same statutes. The following cases hold to the same effect: Phinny v. Phinny, 17 Howe Pr. 197; Cary v. Railway Co., 5 Ia. 357, De Vosse v. Gray, 22 Ohio St. 159; Swank v. Hufnagle, 111 Ind. 453, 12 N. E. Rep. 303; Trust Co. v. Burton, 74 Wis. 329, 43 N. W. Rep. 141; Sells v. Haggart, 21 Neb. 357, 32 N. W. Rep. 66; McLeod v. Railroad Co., 58 Vt. 727, 6 Atl. Rep. 648. In the case at bar the pleader alleged 'that by the statute of Kentucky $2.50 only is allowed as a fee to an attorney in such case, and that a contract for a greater sum as attorney fees is by laws of State of Kentucky illegal and void.' This is an allegation of *the pleader's conclusion as to what the statute of Kentucky provides in that respect, but what that law is in terms is not set forth.* The court therefore properly granted the motion to eliminate from the answer that averment." (Italics ours.)

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Saving v. Kargas Furniture Co., 150 Mo. App. 574, 131 S. W. 153:

"It is therefore essential, when asserting a right in the courts of this state said to have accrued or been derived from the laws of a foreign state that such laws should be pleaded in *haec verba,* or substantially, at least to the end that the court may see and determine for itself what authority and what rights it purports to confer."